SUPREME COURT, U.S.
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Case No. 87-1376

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF OHIO, ex rel.
CITY OF EUCLID

Relator-Appellant

vs.

RICHARD SHANK, Director of the
Ohio Environmental Protection Agency

Respondent-Appellee

On Appeal from the Supreme
Court of Ohio

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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I. STATEMENT OF FACTS

A. IT IS UNCONTROVERTED THAT APPELLEE ACTED UNCONSTITUTIONALLY AND ILLEGALLY

The essential facts of this case remain uncontroverted. After "disputing" the City of Euclid's (hereinafter "City" or "Euclid") Statement of Facts, and spending over 10 pages recounting "facts" totally irrelevant to the City's case,[1] Appellee does not contest the fact that he violated the Constitution and laws of the United States.

B. APPELLEE IS UNDER A CLEAR LEGAL DUTY TO FOLLOW THE PROCEDURES SET FORTH IN THE CLEAN WATER ACT

The Clean Water Act (hereinafter "CWA"), and relevant Federal Regulations, provide that the standard for Waste Water Treatment Plants (hereinafter "WWTP") in discharging certain

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1. The City will not respond here to Appellee's grossly distorted and immaterial Statement of Facts.

effluents is "30/30".[2] The CWA provides that a state Director may order more stringent standards, but only after he: 1) determines local water quality reasons requiring more stringent standards; 2) serves notice to those affected of his determinations; and, 3) holds a public hearing thereon. The Ohio statutory scheme granting authority to Appellee to issue NPDES permits specifically incorporates the procedures set forth in the CWA.

C. APPELLEE FAILED TO PERFORM HIS CLEAR LEGAL DUTY

It is uncontroverted that when Appellee issued the NPDES permit: 1) the effluent limitations contained therein, "12/12", were, and are, much

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2. For a complete discussion and explanation of the terminology used and relevant "BOD" and "SS" standards, please see the City's "Jurisdictional Statement", at pp. 9-10.

more stringent than the "30/30" required by federal law; 2) such limitations were not previously adopted by State regulation and no other similarly-situated Ohio city is subjected to such stringent standards; 3) no determinations of local water quality reasons and related stringent standards were ever made; 4) no notice of the (nonexistent) determinations of local water quality reasons or limitations were made; 5) no hearing concerning the (nonexistent) local water quality reasons was ever held (or waived); 6) the more stringent standards placed on the City were not based on objective local water quality reasons, but, instead, were based on Appellee's subjective opinion as to the City's WWTP "should do"; and, 7) the next permit Appellee issues to the City will also be based on Appellee's opinion of what the City's WWTP "should do."

Appellee does not dispute the bizarre, unequal and unconstitutional results of his arbitrary, capricious, and unlawful permit issuing policy, as demonstrated in the Table presented [See, at p. A-1, attached hereto or Jurisdictional Statement, at p. 22).

D. APPELLEE HAS REFUSED TO CORRECT HIS ILLEGAL AND VOID ACTS

Although the permit was issued with a right of appeal to the State Environmental Board of Review, Appellee did not give the City notice of pertinent determinations or a hearing thereon, from which to appeal or waive. When the City learned, in April, 1982, of Appellee's illegal and unconstitutional acts, it applied to the Ohio EPA for modification of its permit. An application for renewal, including the modifications, was filed in May, 1982. Appellee was under a mandatory duty to act on these applications within 180 days. In

keeping with his refusal to obey statutes, he took no action. Subsequently, Euclid, on February 18, 1986, renewed and amended its applications for original permit modification and issuance of a new modified permit.

It was not until after the Mandamus Complaint in this case was filed in April, 1987, that the City received notice that the Director intended to deny Euclid's application for a new permit. Almost two months later, on June 18, 1987, the City received a similar notice concerning its February 18, 1986 request. Although proper demands were filed for adjudicatory hearings on the notices to deny, no hearing has yet been scheduled. And, no action has been taken to date on the April, 1982 application for modification.

E. THE CITY IS CURRENTLY BEING SUBJECTED TO ENFORCEMENT PROCEEDINGS BASED ON APPELLEE'S ILLEGAL AND VOID ORDER

Currently, in an enforcement action before the U.S. District Court, both the State and Federal EPAs are attempting to enforce the illegal, unconstitutional and void "12/12" standards instead of the "30/30" national standard. The application of the "12/12" standard results in more than twice as many violations by the City and counting violations at levels not applied to any other similarly-situated city.

The Brief of the Ohio Attorney General mischaracterizes the relationship of this case with the pending federal court case. In the federal Court, the Attorney General has argued that the District Court has no jurisdiction to determine the validity of the standards contained in the City's

permit.[3] He knows that the Court, in denying the City's Motion for a Stay of Proceedings, has adopted his position and has held that the issue of the permit's validity must be decided in State Court proceedings. Nevertheless, the Attorney General unashamedly asserts before this Court that this action is an attempt to interfere with the enforcement action.

F. THIS ACTION IS THE CITY'S ONLY REMEDY

This case is not a CWA enforcement action. Instead, it focuses on what remedy a City has when a State EPA has issued a permit that contains unconstitutional, illegal and void standards.[4]

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3. The U.S. has likewise argued that the District Court lacks authority to review the legality of the permit in the enforcement proceeding.

4. The enforcement action in District Court goes back to the year 1979. Thus,
(Footnote Continued)

Appellee would have this Court sanction the enforcement of such standards. The City maintains that Appellee is under a clear legal duty, enforceable by Mandamus, to issue permits with standards, and under procedures, that are constitutional, legal and mandated by the CWA.

II. ARGUMENT

A. THIS COURT SHOULD HEAR THIS MATTER ON ITS MERITS

The remedy Euclid is seeking is one that will allow the pending enforcement proceedings to be fair and just to the residents and taxpayers of the City.

Appellee argues that the City has no constitutional rights and a Writ of Mandamus cannot be issued to control Appellee's discretion. But, Appellee

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(Footnote Continued)
even if Appellee acts on the City's 1982 Application, the City will have no remedy for the years 1979-82.

has no discretion in choosing whether to apply standards and follow procedures mandated by the CWA. Congress has answered Appellee's arguments: the CWA orders Appellee to treat Euclid as a person and to give it the national standard or CWA §302 [33 USC §1312] determinations, notice and hearing. Appellee steadfastly refuses to do so.

Now, the City's tax-paying residents face fines of up to $10,000.00 (recently increased to $25,000.00) a day for not complying with Appellee's void order. The Judge presiding over the enforcement proceedings will not look at the validity of Appellee's order. If permit limitations are unassailable in enforcement proceedings, the question here asked on behalf of all entities subject to arbitrary, intransigent administrative action is: What remedy does a City have against a State EPA that refuses to follow CWA procedures, refuses to grant

the City the rudimentary due process rights mandated by Congress, and then seeks to enforce its illegal and void order before a Court not having jurisdiction over the permit authority to hear the City's challenge of the underlying validity of the order?

B. THIS COURT HAS JURISDICTION OVER THE CITY'S APPEAL PURSUANT TO 28 USC §1257(2)

28 USC §1257(2) provides, in pertinent part, that this Court has appellate jurisdiction over final judgments of a State's highest Court:

> . . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.
>
> * * *

(emphasis added).

1. Appellee's Order Is A "Statute" For Purposes Of 28 USC §1257(2)

This Court has defined the phrase "statute of any state" as "Any

enactment, from whatever source originating, to which a State gives the force of law . . ." Williams v. Bruffy, 96 U.S. 176, at 183 (1877) (emphasis added) [See, also, 12 J. Moore, Moore's Federal Practice, P 514.01 (2d ed. 1982)].

This Court has held that many orders of similar agencies are "statutes" for purposes of §1257(2) [See, Live Oak Water Users' Association v. Railroad Commission of California, 269 U.S. 354 (1926); Sultan Railway v. Timber Co. v. Department of Labor and Industries, 277 U.S. 135 (1928); Hamilton v. Regents of the University of California, 293 U.S. 245 (1934); and, Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of the State of California, 346 U.S. 346 (1953)].

Appellee ordered the contested limitations in the City's WWTP permit and they have been given the force of law in federal and state Court

enforcement proceedings, including the pending enforcement proceedings. Thus, that order is a "statute" for purposes of 28 USC §1257(2).

2. The City Properly Attacked Appellee's Order In The Ohio Supreme Court

Appellee complains that the City did not attack the constitutionality[5] of any state statute in the Ohio Supreme Court. That argument is incorrect.

It is basic law that the constitutionality of a statute may be challenged in two ways: on its face; and, as applied. The City's posture in the instant case is markedly similar to that of the Appellants in Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities

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5. It should be noted that 28 USC §1257(2) confers appellate jurisdiction on this Court when a statute is challenged on the grounds that it is "repugnant to the. . . laws of the United States". The City has consistently asserted that Appellee's order violates the CWA and is void.

Commission of the State of California, supra. In Atchison, the Court held that the California Public Utilities Commission's order was a "statute" for purposes of 28 USC §1257(2) and that, although the Appellants did not challenge the facial constitutionality of the statute authorizing the Commission's order, they had properly raised their constitutional questions as to how that authority was applied. Moreover, the California Supreme Court's refusal to review the Commission's orders was, in effect, upholding the validity of a statute. Id. at pp. 348-349.

In the City's Complaint for a Writ of Mandamus before the Ohio Supreme Court, the City noted Appellee's authority, under State law [Ohio Revised Code (hereinafter "ORC") §6111.01, et seq.] and the void and unlawful application thereof. Just like the appellant in Atchison, the City did not challenge the

facial constitutionality of Ohio's statutory grant of authority to Appellee, but did challenge Appellee's actions in applying his authority to deny the City's rights to Congressionally-mandated due process and equal protection under the CWA.

Thus, for purposes of this Court's jurisdiction under 28 USC §1257(2), the City presented squarely to the Supreme Court of Ohio its contention that Appellee's order violated the Constitution and laws of the United States. By refusing to review Appellee's application of his authority, the Ohio Supreme Court upheld Appellee's authority under §6111.01, et seq., as applied to the City.

This Court has held that where, as here, a State Court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and any state law ground is not

clear from the face of the opinion, it would accept, as the most reasonable explanation, that the State Court's decision was based on federal law [Montana v. Hall, 55 USLW 3727 (April 27, 1987); Michigan v. Long, 463 U.S. 1032 (1983)].6/

In this case, the only issue presented was whether the Director complied with the clear legal mandates of the Constitution and laws of the United States. The only conclusion, therefore, is that the Ohio Supreme Court's decision must have rested on federal grounds. Thus, this Court has

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6. This Court has also stated that where the record fails to reveal whether the State Court's judgment rests on a federal ground or an independent state ground, the Court may make such disposition of the case under review as justice requires [See, Dixon v. Duffy, 342 U.S. 33 (1951); Hammerstein v. Superior Court, 340 U.S. 622 (1950); Orr v. Orr, 440 U.S. 268 (1979); and, Time, Inc. v. Firestone, 424 U.S. 448 (1976)].

jurisdiction to hear this Appeal pursuant to 28 USC §1257(2).7/

C. APPELLEE'S UNLAWFUL ORDER SHOULD NOT BE ENFORCED

1. Appellee's Order Is Unlawful

The authority of the Director of the Ohio EPA to issue NPDES Permits is expressly granted in 33 USC §1342 and ORC §6111.03(J). The State Director must issue State NPDES permits in compliance with all requirements of the CWA and mandatory regulations adopted thereunder [See, §6111.03(J)]. In this case, the Director did not issue

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7. Should this Court determine that the validity of ORC §6111.01, et seq., was not properly drawn into question before the Ohio Supreme Court, then the City requests that this Court, pursuant to 28 USC §2103, treat its "Jurisdictional Statement" as a Petition for Certiorari [See, 12 J. Moore, Moore's Federal Practice, ₱ 607.07[1] (2d ed. 1982); Operating Engineers v. Jones, 460 U.S. 669, at 675 (1983); and, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, at 562-563 (1980)].

Euclid's 1977 NPDES Permit in compliance therewith.

CWA §301(a) [33 USC §1311(b)] requires a State Director to issue WWTP permits with effluent limitations "based upon secondary treatment as defined by the Administrator pursuant to §304(d)(1) of this Act" [33 USC §1314(d)(1)]. Secondary treatment is defined as "30/30" [40 CFR 133.102]. The CWA allows a Director to issue permits with more stringent limitations, but only: (1) if he determines that local water quality reasons require the standards; (2) after notice of a determination of such reasons; and, (3) after a hearing [33 USC §1312(a)(b)].

In the instant case, the Director issued a permit to the City with more stringent effluent limitations, which are void because there were no prior determinations, notice or hearing.

2. Euclid Has No Other Legal Remedy

In the enforcement proceedings before the U.S. District Court, the Court found no jurisdiction to review the validity of the City's permit [33 USC §1369(b)(2)]. Hence, Euclid is subject to enforcement of void permit limitations and has no legal remedy unless this Court issues a Writ of Mandamus ordering Appellee to comply with his clear legal duty.

Appellee claims that the City, by failure to appeal from the permit issuance, has waived its right to challenge the void and illegal standards. Such a waiver, however, can only occur after notice, and must be made voluntarily, intelligently and knowingly [See, Fuentes v. Shevin, 407 U.S. 67, reh'g. den. 409 U.S. 902 (1972)].

Moreover, Appellant's argument would negate the responsibility of all State

EPAs to follow the CWA's mandated procedures. If Appellee's position is correct, then the CWA's requirements of prior determinations, notice and hearing will be rendered null and void.

After learning in April, 1982, that the Director had not issued the permit in compliance with federal law, the City filed numerous Applications for Modification with the Appellee. The Appellee, however, has no intention of addressing Euclid's position that the permit is unlawful. Even if the Director agrees to address the issue, the City still will have no remedy for the years 1977 through 1982. Further, Appellee uses the City's failure to meet the void standards as grounds to deny the City's applications for modification and a new permit.

An illegal and void order is not enforceable [See, Federal Power Commission v. Panhandle E.P.L. Co., 337 U.S.

498 (1949)], and, to be entitled to judicial assistance, an order issued by an administrative agency must be valid [See, Federal Power Commission v. Panhandle E.P.L. Company, supra; and, N.L.R.B. v. Babcock & Wilcox, 351 U.S. 105 (1956)].8/ Thus, unless and until Appellee makes the determinations and gives notice and a hearing as mandated by CWA, the CWA's mandated standard of "30/30" must be applied.

III. CONCLUSION

For the reasons set forth in this Brief and the City's earlier Jurisdictional Statement, this Court should give plenary consideration to this Appeal.

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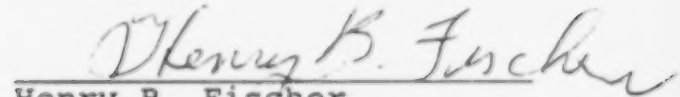
8. Such a rule of law is in keeping with general legal principles. A void or unconstitutional law cannot be enforced in criminal or civil proceedings. Similarly, a final judgment of a Court can be challenged as unenforceable if it is void or based upon an invalid or void law.

Respectfully submitted,



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Dated: May 5, 1988

CERTIFICATE OF SERVICE

Three copies of the foregoing APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM were forwarded by regular U.S. Mail, postage prepaid, to Anthony J. Celebrezze, Jr., Attorney General of Ohio and to Margaret A. Malone and Terrence M. Fay, Assistant Attorney General, Environmental Enforcement Section, 30 East Broad Street, 17th Floor, Columbus, Ohio 43266-0410, on this 5th day of May, 1988.

Henry B. Fischer

A P P E N D I X

COMPARISON OF EXISTING NPDES PERMIT LIMITATIONS FOR ENTITIES DISCHARGING TO LAKE ERIE

ENTITY	BOD 30-day	BOD 7-day	SS. 30-day	SS. 7-day
Willoughby/ Eastlake	20	30	20	30
*Euclid	12	18	12	18
N.E. Regional 14021 Lake Shore	20	30	20	30
N.E. Regional 5800 Memorial Shoreway	20	30	20	30
Lakewood	20	30	20	30
Rocky River	20	30	20	30
Avon Lake	20	30	20	30
Lorain	20	30	20	30
Sandusky	18	24	20	30
Toledo	30	45	25	40

*Euclid users are subject to the "12/12" standard and exposed to 66.7% more violations than are users of other WWTPs subject to the "20/20" standard and also discharging into Lake Erie and 166% more violations than would apply if the mandatory "30/30" National Secondary Treatment Standard was applied.

28 USC §1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 USC §2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

33 USC §1369. Administrative procedure and judicial review

* * *

(b) Review of Administrator's actions.

* * *

(2) Action of the Administrator with respect to which could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.